NG SENG KEE

v.

DANAHARTA URUS SDN BHD

HIGH COURT MALAYA, MUAR
AHMADI ASNAWI JC
[CIVIL SUIT NO: 23-73-2003]
30 APRIL 2008

CIVIL PROCEDURE: *Summary judgment - Setting aside - Triable issues - Banking facilities - Limitation - Whether claim statute-barred - "Some other reason" for trial - Limitation Act 1953, s. 6 - Rules of the High Court 1980, O. 14 r. 3(1)*

WORDS & PHRASES: *"Some other reason" (for trial) - Order 14 r. 3(1), Rules of the High Court 1980*

This was an appeal by the appellant against the decision of the Senior Assistant Registrar allowing the respondent's application to enter summary judgment against the appellant. The respondent had approved and granted various banking facilities to the appellant including fixed loans and overdraft facilities ('said banking facilities'), and its claim against the appellant was for the total sum of RM1,545,884.79. In contending that the summary judgment should be set aside, the appellant raised the following issues: (i) that the respondent's claim was barred by s. 6 of the Limitation Act 1953 since the respondent had failed to establish that there were transactions between the respondent's predecessor (Bank Bumiputera Sdn Bhd) and the appellant within six years from the filing of this action, and that being so, the respondent had no cause of action against the appellant; and (ii) alleged manipulation of the appellant's account, breach of contract and fraud by the respondent's predecessor. The appellant in his statement of defence and affidavit clearly pointed out why he alleged that his account was manipulated by the respondent's predecessor's employee; the appellant even named the said employee. The respondent, on the other hand, submitted that the limitation period must be calculated from the date of the vesting of the said banking facilities upon it on 1 January 2000. The writ of summons and statement of claim were filed on 6 August 2003, which was well within the six years before limitation set in. The respondent also claimed that it had no knowledge about the appellant's allegation of account manipulation and, hence, was not responsible for the alleged fraud.

Held (allowing the appeal):

(1) The earliest possible date that the respondent could bring an action against the appellant for breach of contract, being the first date of its default in the repayment of its overdraft facilities when the same became due, was the date the cause of action commenced. The limitation period ran from this earliest point where an action could be brought against the defaulter; however, it was not known when this took place. Therefore, to allow the respondent's contention that the limitation period commenced from 1 January 2000, the date of the vesting of the said banking facilities, would lead to a mockery of the law on limitation and had no basis in law at all. The fact that there was correspondence between the respondent's and the appellant's solicitors up to October 2000 could not extend the period of limitation up to that date, as this correspondence could not extinguish the respondent's burden to file its action within the time allowed by law. Indeed, the issue that the respondent's claim was statute-barred was a triable issue that required a full hearing for its just determination. (para 9)

(2) The respondent's contentions of lack of knowledge of any account manipulation or lack of legal liability were without basis in law for, on the surface of it, the appellant's defence was very much intertwined with the conduct of the named employee of the predecessor bank. Additionally, the respondent acknowledged the presence of this named employee. The appellant's case appeared to become stronger when this court, on 31 October 2006, granted an order to the appellant to include Bank Bumiputera Malaysia Bhd as a third party upon the appellant's application to answer the various allegations of fraud, negligence and manipulation of the appellant's account. The respondent could not simply wash its hands upon these issues and proceed upon the assumption that everything was above board. The fact that a third party had been included in these proceedings constituted "some other reason" for trial within the requirement of O. 14 r. 3(1) of the Rules of the High Court 1980. (para 12)

(3) Based on the above reasons, the respondent's claim was not plain and obvious which entitled it to summary judgment. (para 15)

Case(s) referred to:

Alloy Automotive Sdn Bhd v. Perusahaan Ironfield Sdn Bhd [1986] 1 CLJ 2; [1986] CLJ (Rep) 45 SC ***(refd)***

Bank Negara v. Mohd Ismail Ali Johor & Ors [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC ***(refd)***

Concentrate Engineering Pte Ltd v. UMBC Corp Bhd [1990] 1 LNS 41 HC ***(refd)***

Credit Corporation (M) Bhd lwn. Fong Tak Sin [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69 SC ***(refd)***

Majlis Perbandaran Klang v. Generation Products Sdn Bhd [2006] 2 CLJ 1511 CA ***(refd)***
Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd [1987] 1 CLJ 246; [1987] CLJ (Rep) 182 SC ***(refd)***
Nasri v. Mesah [1970] 1 LNS 85 FC ***(refd)***
South East Asia Insurance Bhd v. Kerajaan Malaysia [1998] 1 CLJ 1045 CA ***(refd)***
Tengku Ismail Tengku Sulaiman & Ors v. Sia Cheng Soon & Anor [2006] 3 CLJ 556 CA ***(refd)***
The Great Eastern Assurance Co Ltd v. Indra Janardhana Menon [2005] 4 CLJ 717 FC ***(refd)***
Topland Management Corporation Sdn Bhd & Anor v. Bank Negara Malaysia [2005] 1 LNS 381 HC ***(refd)***

Legislation referred to:
Limitation Act 1953, s. 6(1)(a)
Rules of High Court 1980, O. 14 r. 3(1)

For the appellant - Azmi Maulud; M/s AB Sidek & Co
For the respondent - M Manian; M/s Manian K Marappan

Reported by Suresh Nathan

JUDGMENT

Ahmadi Asnawi JC:

[1] This is an appeal by the appellant/defendant against the decision of the learned senior assistant registrar made on 24 November 2005, allowing the respondent's/plaintiffs application to enter summary judgment against the appellant.

[2] The respondent approved and granted various banking facilities to the appellant including fixed loans and overdraft facilities *vide* letters of offers dated 28 January 1997, 3 December 2007 and 7 August 1997 (the said banking facilities). The respondent's claim against the appellant is for the total sum of RM1,545,884.79 as at 31 August 2002, with interest at the rate of 2% per annum above the Base Lending Rate of Malayan Banking Berhad, calculated on monthly rest basis starting from 31 August 2002 until the date of realization.

[3] The appellant raised a number of issues, contending that the appeal should be allowed and the summary judgment entered by the senior assistant registrar be set aside. The first issue is that the respondent's claim is barred by s. 6 of Limitation Act 1953, as the respondent has failed to establish that there were transactions between the respondent's predecessor (Bank Bumiputra Sdn Bhd) and the

appellant within six years from the date of filing of this action. That being so, the respondent in fact has no cause of action against the defendant. On the other hand, the respondent submitted that the limitation period must be calculated from the date of the vesting of the said banking facilities upon them on 1 January 2000. The writ of summons and the statement of claim was filed on 6 August 2003 and it was filed well within the six years before limitation sets in.

[4] Both the parties were poles apart on the issue of whether the respondent's action was statute barred. At the end of the day what the court has to consider is whether at the material time of filing the suit the respondent is clothed with a cause of action. In this case, it must necessarily be founded upon the premise that its claim is not statute barred. The Federal Court in the necessarily be founded upon the premise that its claim is not statute barred. The Federal Court in the case of *Nasri v. Mesah* [1970] 1 LNS 85 enumerated the meaning of cause of action in the following terms:

> A "cause of action" is the entire set of fads that gives rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment (per Lord Esher MR in *Read v. Brown* [1889] 22 QBD 128, 131). In *Reeves v. Butcher* [1891] 2 QB 509, 511 Lindley LJ said:
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> This expression, 'cause of action', has been repeatedly the subject of decision, and it has been held, particularly in *Hemp v. Garland* LR 4 QB 519, decided in 1843, that the cause of action arises at the time when the debt could first have been recovered by action. The right to bring an action may arise on various events; but it has always been held that the statute runs from the earliest time at which an action could be brought.
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> In *Board of Trade v. Cayzer, Irvine & Co.* [1927] AC 610, 617. Viscount Dunedin described "cause of action" as that which makes action possible. Now, what makes possible an action founded on a contract is its breach. In other words, a cause of action founded on a contract accrues on the date of its breach. Similarly, the right to sue on a contract accrues on its breach. In the case of actions founded on contract, therefore, time runs from breach (per Field J in *Gibbs v. Guild* [1881] 8 QBD 296, 302). In the case of actions founded on any other right, time runs from the date on which that right is infringed or there is a threat of its infringement (see *Bolo*'s case LR 57 IA 325). It would seem clear, therefore, that the expressions "the right to sue accrues", "the cause of action accrues" and "the right of action accrues" mean one and the same thing when one speaks of the time from which the period of limitation as prescribed by law should run.

[5] A cause of action accrues when there is in existence a person who can sue and another who can be sued *Topland Management Corporation Sdn Bhd & Anor v. Bank Negara Malaysia* [2005] 1 LNS 381. Hence the pertinent question to ask at this stage in order to determine whether the respondent's claim is already statute barred is to investigate when actually is the precise moment the limitation period starts to run. An action based on overdraft facilities is an action founded on contract. Obviously in such event the cause of action accrues on the date of its breach. Section 6(1)(a) of the Limitation Act 1953 provides that action founded on a contract shall not be brought after the expiration of six years from the date on which the cause of action accrued. Hence, the limitation period as provided by the Limitation Act 1953 activates on that specific date of the occurrence of the breach upon which the cause of action is premised. The limitation period obviously cannot start to run from the date of the vesting of the said interests upon the respondent as contended by the respondent for it would deprive the appellant the opportunity of relying upon this valid ground of defence. In *The Great Eastern Assurance Co Ltd v. Indra Janardhana Menon* [2005] 4 CLJ 717, Federal Court held:

> Section 6(i)(a) of the Act provides that 'actions founded on a contract shall not be brought after the expiration of six years from the date on which the cause of action accrued";. The law on when a cause of action accrues is already well settled and very much entrenched in our jurisprudence which is this. A cause of action founded on contract accrues on the date of its breach and that time begins to run from that breach.

[6] A proceeding to enforce the contract will start when there is a demand against a person following the default. In *Majlis Perbandaran Klang v. Generation Products Sdn Bhd* [2006] 2 CLJ 1511, Court of Appeal stated:

> Though, as I have already said, they also lay down that proceedings to enforce payment cannot be commenced until there has been a demand and subsequent default. On the hearing of the application proof is required of the service of the summons, that the sum mentioned, and that it has been demanded and not paid.

[7] In this case, there is no evidence of any demand ever being made by the predecessor of the respondent within the six years period commencing from the date of the default or breach. No action was brought against the appellant until the vesting date. There is nothing in the respondent's documentation to indicate the precise date of breach or default committed by the appellant. The actual date of the said breach or default was never determined. Therefore, the appellant should be allowed to have recourse to the benefit of the defence of limitation as

provided by law if the said defence is available to him. His Lordship Hashim Yeop Sani in *Credit Corp. (M) Bhd lwn. Fong Tak Sin* [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69 outlined the purpose of the law on limitation as follows:

> The limitation law is promulgated for the primary object of discouraging plaintiffs from sleeping on their action and more importantly, to have a define end to litigation. This is in accord with the *maxim interest republicate it sit fini litium*, that in the interest of the state there must be an end to litigation. The rationale of the limitation law, should be appreciated and enforced by the courts.

[8] Meanwhile, in *Tengku Ismail Tengku Sulaiman & Ors v. Sia Cheng Soon & Anor*, Court of Appeal [2006] 3 CLJ 556 was of the view that:

> Pausing here for a moment, the doctrine of limitation is based on two broad considerations. Firstly, there is a presumption that a right that is not exercised for a long time is non-existent. The other is that, it is necessary that matters of right in general should not be left too long in a state of uncertainty or suspense. Limitation law is thus promulgated for the primary object of discouraging plaintiffs from sleeping on their actions, and more importantly, to have a definite end to litigation.
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> Parliament has provided that a defendant, placed in the position such as the present, the opportunity to avoid the plaintiffs "stale" claim. Section 7(5) enables them to raise a procedural bar preventing the plaintiffs from pursuing the action against the defendants by reason of it being instituted outside of the time frame prescribed.

[9] In this case, the earliest possible date that the respondent could bring an action against the appellant for breach of contract, being the first date of their default in the repayment of their overdraft facilities when the same became due is the date the cause of action commences. The limitation period runs from this earliest point where an action could be brought against the defaulter. However as to when this took place is not known. Therefore, to allow the respondent's contention that the limitation period commences from 1 January 2000, that is the date of the vesting of the said banking facilities would lead to a mockery of the law on limitation and has no basis in law at all. The fact that there were correspondence between the respondent's solicitors and then the solicitor for the appellant up to October 2000 could not extend the period of limitation up to that date for these correspondence could not extinguish the respondent's burden to file its action within the time allowed by law. Indeed the issue that the respondent's claim is statute barred is a triable issue which requires a full hearing for its just determination.

[10] The appellant also alleged manipulation of account, breach of contract and fraud by the predecessor of the respondent. The appellant in his statement of defence and affidavit clearly pointed out why he

alleges that his account number CA 924471 was manipulated by the respondent's predecessor employee. The appellant even named the said employee. On the other hand, the respondent merely claimed that they had no knowledge about the allegation and therefore was not responsible for the alleged fraud.

[11] It is a well settled principle governing the evaluation of affidavit evidence that where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict is usually treated as an admission by him of the fact so asserted (See *Alloy Automotive Sdn. Bhd. v. Perusahaan Ironfield Sdn. Bhd.* [1986] 1 CLJ 2; [1986] CLJ 45). The respondent then must provide an explanation to the court to resist the appellant's allegations. In this case, the plaintiff failed to offer any explanation or reply about the fraud or manipulation of account aside from claiming that they have no prior knowledge about the manipulation of account or fraud on the part of their predecessor's employee. The respondent also contended that as the successor they are not legally liable for any misconduct committed before they took over the predecessor's right and interest.

[12] With respect, in my view these contentions are without basis in law for on the surface of it the appellant's defence is very much intertwined with the conduct of the named employee of the predecessor bank. Additionally the respondent acknowledged the presence of this named employee. The appellant's case appears to become stronger when this court on 31 October 2006, granted an order to the appellant to include Bank Bumiputra Malaysia Berhad as a third party upon the appellant's application to answer the various allegations of fraud, negligence and manipulation of the appellant's account. The respondent cannot simply wash his hands upon these issues and proceeded upon the assumption that everything is above board. The fact that a third party has been included in this proceedings in my view constitutes "some other reason" for trial within the requirement of O. 14 r. 3(1) of the Rules of High Court 1980. In *Concentrate Engineering Pte Ltd v. UMBC Corp Bhd* [1990] 1 LNS 41, which involved the issue where the defendant's cheques were fraudulently duplicated, the court in that case was of the view that in the absence of any explanation it will constitute "some other reason" for a trial in terms of O. 14 r. 3(1) of the RHC 1980. The court stated:

> The question before me is whether the circumstances are such that the defendants ought, in the interest of justice, be given time and with it the opportunity to investigate further the fraud by whatever means that are available to them, including a trial, to determine for themselves whether they are liable as bankers.

[13] The underlying philosophy in the O. 14 provision is to prevent a plaintiff clearly entitled to the money from being delayed his judgment where there is no fairly arguable defence to the claim. The provision should only be applied to cases where there is no reasonable doubt that the plaintiff is entitled to judgment. Order 14 is not intended to shut out a defendant. The jurisdiction should only be exercised in very clear case (see *Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd* [1987] 1 CLJ 246; [1987] CLJ (Rep) 182). In a situation where a defendant successfully shows that he has a case to put up for trial or there ought for some other reason to be a trial, the court will be reluctant to dispose the case summarily. The scenario in this case before me is no different.

[14] It is well settled that if a defendant in an O. 14 application succeeds in raising even a single triable issue, it will not be a fit and proper case to order summary judgment. It is only in plain and obvious cases where there are no issues to be tried should recourse be had to O. 14 (per Shaik Daud Ismail JCA in *South East Asia Insurance Bhd v. Kerajaan Malaysia* [1998] 1 CLJ 1045). In *Bank Negara v. Mohd Ismail Ali Johor & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14, Mohamed Azmi SCJ explained the application of O. 14 as follows:

> In our view, basic to the application of all those legal propositions is the evidence that the defend has not only raised an issue but also that the said issue is triable. The determination of whether an issue is or is not triable must necessarily depend on the facts or the law arising from each case as disclosed in the affidavit evidence before the court.

[15] Based on the above reasons, I am of the view that the respondent's claim is not plain and obvious which entitled them to sign summary judgment. Therefore, I allowed this appeal and set aside the order of the learned senior assistant registrar with cost.